U.S. Department of Justice

Immigration and Naturalization Service

B6

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FEB 27 2003

File: LIN 02 046 56199 [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals office on appeal. The appeal will be dismissed.

The petitioner is a restaurant and bakery. It seeks to employ the beneficiary permanently in the United States as a pastry baker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements….

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is April 3, 2001. The beneficiary's salary as stated on the labor certification is $12 per hour or $24,960 per year.

Counsel initially submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. It reflected taxable income of $(32,072), a loss. The director relied on it as primary evidence and determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. Counsel conceded that the 2000 federal tax return did not establish eligibility, but reasoned that it was to the petitioner's advantage to wait for the filing date of the 2001 federal tax return. Still, counsel has not submitted the 2001 tax return, annual report or audited financial statement to date. 8 C.F.R. 204.5(g)(2). The non-existence or unavailability of required evidence creates a presumption of ineligibility, and the director properly relied on the presumption. 8 C.F.R. §

103.2(b)(2).

Initially, the secondary evidence included the ending balance of the petitioner's bank statement for April 30, 2001, at the priority date. It was $10,070, also less than the proffered wage.

On appeal, counsel summarizes representations to her from an official of the petitioner. They are of little weight. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel presents on appeal a letter of March 12, 2002 (letter) attesting to a bank balance of $29,199.78 as of that date, more than the proffered wage. It does not, however relate to the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145; *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require the same result. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The letter concerns the bank balance of a different business, not the petitioner's. The petitioner corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, assets of its shareholders or of other enterprises or corporations can not be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

After a review of the federal tax return and other evidence, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.